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No. 1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

HARTE-HANKS NEWSPAPERS,
ABILENE, TEXAS, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ABILENE, TEXAS, ET AL,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Harte-Hanks Newspapers, Abilene, Texas, Banner Publishing Company, Marshall Publishing Company, Matt Sheley, Publisher, The Greenville Herald-Banner and Denison Herald, Inc., respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review

the decisions of the United States Court of Appeals for the Fifth Circuit, rendered on April 24, 1958, which reversed the judgment of the United States District Court for the Northern District of Texas, and remanded the cause for the entry of an order denying petitioners' motion.

Opinion Below

In the United States District Court for the Northern District of Texas, Fort Worth Division, sitting in the Dallas Division of said District, Judge Atwell heard petitioners' motion to suppress certain subpoenas directed to Harte-Hanks Newspapers, to Banner Publishing Company, to Marshall Publishing Company, to Matt Sheley, Publisher, to The Greenville Herald-Banner and to Denison Herald, Inc (R. 3-7, 8-28) Judge Atwell suppressed the subpoenas. (R. 29-30, 76-77)

United States appealed to the United States Court of Appeals for the Fifth Circuit; and that Court reversed the order made by Judge Atwell. (R. 84-89)

On appeal to the United States Court of Appeals for the Fifth Circuit, the decree was:

> * * * "the order of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court". * * * (R.91)

From this order petitioners are appealing. Appendix A.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). See also Rules 37(b) (2) and 45(a) F. R. Crim. Pro. Title 18, Section 3231, U. S. C. confers jurisdiction.

Date of Judgment

Judgment was handed down and entered April 24, 1958. (R. 84, 91) Appendix B.

Motion to Stay Mandate

Motion to stay issuance of the mandate and for extension of time under 28 U. S. C. Sec. 2101, pending the filing of application for writ of certiorari from the Supreme Court, was granted and the time was extended for thirty days, that is, thirty days from May 14, 1958. (R. 98)

Questions Presented

I.

When it is proved by two witnesses that "the Government agent requested the right to examine the books, records and files of the four newspapers, (and) he was informed that these records would be submitted to him on condition that they be not used in connection with any criminal investigation or prosecution, and he was requested to note this condition in his report to the Government", does the testimony of one negative witness investigating the facts overcome the testimony of the two witnesses,

especially when the trial court heard the testimony of the two witnesses as against the testimony of the Government agent, and found favorably to petitioners? (R. 85)

II.

The Court of Appeals allowed the issue to turn on the following uncertainty:

> "We are not able to say that these findings of fact are clearly erroneous and we accept them as the predicate upon which our decision will rest." (R. 86)

Can such uncertainty be accepted to turn the course of justice? (R. 90)

Invalid subpoenas were left with petitioners. (R. 8-22)

Constitutional Amendment and Statutes Involved

The Fourth Amendment to the Constitution of the United States.

Rule 41(e) of the Federal Rules of Criminal Procedure, Motion for Return of Property and to Suppress Evidence, as for example, "for use as evidence anything so obtained on the ground that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued".

Specification of Errors

The Court of Appeals erred in refusing to hold that the evidence should have been withheld from

the grand jury on the ground that it was illegally obtained in violation of petitioners' rights under the Fourth Amendment to the Constitution of the United States.

Reasons for Granting the Writ

The court below has decided important questions of federal law which have not been, but which should be, settled by this Court.

Argument

Petitioners pray that a writ of certiorari issue in this cause to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the United States District Court for the Northern District of Texas and rendering judgment for the United States of America.

The Government appealed from orders of the District Judge. (R. 31-32, 76-77) The findings of the District Judge were:

> * * * "that the material that was taken from the complainants was furnished to the government's representative after a conference with the attorneys for the newspapers wherein it was agreed that the goverment's representative might retain the matter, provided the same was not used in a criminal prosecution, or, in an attempt to secure a criminal indictment." (R. 31-32)

The Judge made the further finding:

> * * * "that the papers that were secured by the subpoenas were secured, as I have

> just said, by an agreement with the complainants' attorneys and that the papers should not be used before the grand jury in a criminal case." (R. 32)

The final order of the United States District Judge was entered on August 5, 1957. (R. 76-77) Therein the Court stated:

> * * * "having read the pleadings and heard the evidence and argument of Counsel is of the opinion and finds that such restrictions and conditions were imposed by Movants upon any examinations by agents of the Government of any of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions.
>
> "IT IS, THEREFORE, THE ORDER AND JUDGMENT OF THIS COURT, that said restrictions and conditions be respected and enforced, and that any information obtained by the Government agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." (R. 77)

Heretofore there was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Harte-Hanks Newspapers, Abilene, Texas, and commanding said Harte-Hanks Newspapers to appear in the United States District

Court for said District at the United States courthouse in the City of Dallas, Texas, "on the 5th day of August, 1957, to testify before the grand jury and bring certain documents described in a paper called an 'ANNEX' attached to said subpoena". June 14, 1957, a copy of an unsigned, undated subpoena, without seal, was left with a representative of Harte-Hanks Newspapers. (R. 8-12)

There was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Banner Publishing Company, and commanding said Banner Publishing Company to appear in the United States District Court for said District at the United States courthouse in the City of Dallas, Texas, "on the 5th day of August, 1957, to testify before the grand jury and bring certain documents described in a paper called an 'ANNEX' and attached to said subpoena". On July 6, 1957, a copy of an unsigned, undated subpoena, without seal, was left with a representative of Banner Publishing Company. (R. 12-17)

There was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service on Marshall Publishing Company, commanding said company to appear in the United States District Court for the Northern District of Texas at the United States courthouse in the City of Dallas on August 5, 1957, to testify before the grand jury "and bring certain documents described in a paper called an 'ANNEX' attached to said subpoena"; said subpoena was served on July 22, 1957. A copy of an

unsigned subpoena dated July 17, 1957, without seal, was left with a representative of Marshall Publishing Company. (R. 18-20)

There was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, a purported subpoena directing service upon Matt Sheley, Publisher, The Greenville Herald-Banner, Greenville, Texas, commanding Sheley to appear in the United States District Court in the City of Dallas on August 7, 1957, to testify before the grand jury; subpoena was served on July 20, 1957. A copy of an unsigned subpoena dated July 12, 1957, without seal, was handed to said Sheley. (R. 21-22)

Petitioners contend that the attempted service described above did not conform to the requirements of the rules, and that said subpoenas should be suppressed.

Prior to the time that any of the above process was issued a representative of the United States Government asked the privilege of examining certain letters, papers and records that passed between the corporations and corporate officers. The request was made of one of the attorneys for one or more of the above named parties. The attorney agreed to submit such letters, papers and records for examination by said representative, conditioned that none of them would be used in any manner in the prosecution of any action against any person, or company, or corporation, named or referred to therein. The papers were submitted to said representative of the Government upon the terms above stated.

The process now issued calls for production before the grand jury of papers which were so submitted to the Government representative under the terms above stated. The use of any such papers in any attempted prosecution would be a violation of the conditions upon which they were submitted, and the Court should suppress the subpoenas and order the above stated conditions respected.

In *Harte-Hanks Newspapers, etc., versus United States Officers and Jury*, 154 Fed. Supp. 68, United States District Judge Atwell ruled that petitioners were entitled to an order denying to the Government the right to use the documents herein described before the grand jury.

The trial court, presided over by a district judge of wide experience, heard the testimony of the witnesses and made the finding "that such restrictions and conditions (that information obtained by examination of petitioners' papers would not be used in connection with any criminal prosecution) were imposed by Movants (petitioners) upon any examination by agents of the Government of any of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions." The order followed "that said restrictions and conditions be respected and enforced, and that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." (R. 77)

It was under the conditions and limitations which the trial court so imposed that the Government agents were to examine the books, records, files and correspondence, or they were not to be examined by the agents of the Government.

The trial judge had found that the papers, books, records, files, reports and correspondence were the property of the petitioners, and evidently he had reached the conclusion that there was not any sufficient reason shown or stated that would form a legal basis for the Government reaching by subpoena such records, papers, books, etc.

There was not any allegation that the papers, books, records, files, reports and correspondence listed in the annex to any subpoena would show a law violation subject to prosecution in a District Court of the United States.

After hearing the cause the court found that the papers secured by subpoenas were secured "by an agreement with the complainants' attorneys and that the papers should not be used before the grand jury in a criminal case". (R. 31-32)

In the order, the court referred to the motions for orders suppressing the subpoenas duces tecum, "and for enforcement of the conditions imposed preliminary to any examination or inspection by agents of the Government of the books, records and files of the movants, under which condition representatives of the Government preliminary to any subpoena being served did in fact examine, inspect and copy books, records, files and correspondence which were in possession of movants under the above stated condition imposed by movants." (R. 76)

Harte-Hanks Newspapers rely upon Rule 17(d) *Federal Rules of Criminal Procedure.* The attempted service did not conform to the requirements of the rules and the subpoenas should be suppressed.

Prior to any process having been issued, a representative of the Government requested to examine certain papers, records, etc., which had passed between the "above named corporations and corporate officers". Attorneys for petitioners agreed to submit papers for examination upon condition that none would be used in any manner in the prosecution of any person, company or corporation named therein. The papers were submitted on those terms to the examination of the Government agent or employee. The process last issued calls for production before the grand jury of some, if not all, of the papers submitted to the Government agent. The use of the papers in an attempted prosecution would be a violation of the condition imposed upon the consent that respondent examine the papers; and the Court should suppress the subpoenas and order that the above stated conditions should be respected. (R. 3-7)

Unsigned, undated purported copies of subpoenas commanding appearance before the grand jury were left with Harte-Hanks Newspapers, Banner Publishing Company, Marshall Publishing Company and Matt Sheley, Publisher, The Greenville Herald-Banner. In the unsigned copies of subpoenas served by the Government, excepting the one to Matt Sheley, demand was made for matters listed by respondent under the word "Annex". In the list under

the Banner Publishing Company there is attached a list of desired papers, including articles of incorporation, by-laws, profit and loss statements, lists of stockholders owning 10% or more of the voting capital stock, all correspondence, memoranda or other communications passing between the corporation, its officers, directors or employees, and (1) Harte-Hanks, its partners, employees or agents, (2) Banner Publishing Company, its officers, employees or agents, (3) any newspaper in the Harte-Hanks chain, its officers, employees or agents and (4) any other concern and any other person, relating to the following: Greenville Morning Herald and Greenville Evening Banner. (R. 8-11)

The request directed to Banner Publishing Company and the request directed to Marshall Publishing Company did not descend into as much detail as was requested in Exhibit C. (R. 18-20)

"Preliminary to any subpoena being served Government agents did in fact examine, inspect and copy books, records, files and correspondence which were in possession of movants (Petitioners here) under stated conditions imposed by movants." (R. 76) The court found that such restrictions and conditions were imposed by movants (Petitioners here) upon any examination by agents of the Government of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions. (R. 76-77)

The court ordered:

> * * * "that said restrictions and conditions be respected and enforced, and that any information obtained by the Government agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." (R. 77)

The trial judge having heard the testimony stated:

> "After having heard the testimony, however, and using the Chancellor's power to pass upon the credibility of the witnesses who have testified, I am of the opinion and find that the defendants, who and which were being exposed for the divulgence of testimony which could be used before the Grand Jury in a criminal investigation, that such admonition and pledge was exacted by the attorney for these respective publications, and that that understanding, whether it was agreed to by the Government or not is quite immaterial, was to the effect that such information, as, is and was furnished, should not be used in any criminal investigation or by the Grand Jury for such purpose. I think the testimony further demands that the court recognize from this testimony here that the purpose of this was for criminal indictments to be sought and found by the Grand Jury, which was then in session at Dallas, Texas.
>
> * * * "This information must not be used before the Grand Jury for criminal investigation." (R. 70-71)

> "The Court having read the pleadings and heard the evidence and argument of Counsel is of the opinion and finds that such restrictions and conditions were imposed by Movants (Petitioners here) upon any examination by agents of the Government of any of said books, records, files and correspondence, and that the agents of the Government made their examination of said books, records, files and correspondence under such restrictions and conditions." (R. 77)

The basic question presented is whether petitioners were fairly and legally treated in respect to petitioners' association with Mr. Horton, a government agent. Apparently Mr. Horton was interested in balance sheets, balance statements and operating statements for the years June 30, 1951 to June 30, 1953 of Banner Publishing Company, The Synder Daily News, Big Spring Herald, Denison Herald, Paris News, Marshall News, Greenville Banner, Abilene Reporter-News, San Angelo Standard Times and Corpus Christi Times, and the lineage run for each of these papers for the same period. Mr. Meador was of the opinion that the above list covered the items asked for by Mr. Horton. Mr. Meador told Mr. Horton that he would go and talk with Mr. McMahon, attorney for the newspapers and a practicing attorney in Abilene, Texas, in respect to the request made by Mr. Horton. Mr. McMahon told Mr. Horton that:

> "We wish to cooperate with you; but I want to place you on notice that if it is to be used in connection with criminal prose-

> cution, we do not intend to give you any information." (R. 46)

Mr. Horton stated that he did not

> "know the purpose it was to be used for; he was requested to get that information, and Mr. McMahon said that he wanted him 'to place a note in your report that we called this to your attention, and we are giving you that information on this condition.'" (R. 46)

Mr. Horton was then asked:

> "What was the condition that you speak of?"

The reply was: "That it was not to be used in connection with criminal prosecution." (R. 47)

Mr. McMahon, attorney for petitioners, had been consulted concerning the matter under investigation. Mr. Horton accompanied Mr. Meador to Mr. McMahon's office. Mr. Horton exhibited his FBI credentials; he told Mr. McMahon that he "was commissioned by his superiors to make some examinations and get some information from the files of the paper". Mr. Horton was asked the purpose of the examination. "He stated that he did not know; that he is merely a field agent; that he had the order to get this information and was there to do his job." (R. 51-52)

Mr. McMahon questioned Mr. Horton whether the desired information was to be used in furtherance of any criminal prosecution. Mr. Horton stat-

ed that he did not know. He did not exhibit any letter relating to an anti-trust investigation. Mr. McMahon stated that he wanted to cooperate with any legitimate aims of the Government; but that he wanted his examination to be definitely on the condition that what he learned or what he copied or the information that he got from the files was not to be used by him in furtherance of any criminal prosecution.

Mr. Horton stated that he did not know whether what he learned would or would not be used in that manner.

Mr. McMahon told Mr. Horton that if he filed a report he (McMahon) would appreciate Horton's incorporating in the report the substance of their conversation and the condition imposed upon Mr. Horton's going into the files of the newspapers.

Mr. Owens asked the question: "Did you undertake to place this condition in writing that you have just testified to?" Mr. McMahon's reply was:

> "I undertook to get it placed in writing in a sense that the gentleman would incorporate it in his report so that not only the examination that he was then conducting, but all future requests, would be governed by the condition that he was supposed to put in that report. He told me he would put it in there." (R. 54)

Mr. Horton testified that he was a special agent of the Federal Bureau of Investigation and that he was located in Abilene. Mr. Horton told of his calling on Mr. Meador and presenting him with a letter from

the Assistant Attorney General of the United States. He told Mr. Meador that he did not have to furnish him with any information; that any he did furnish could be used in court. Apparently the principal subject was the organizational set up of the newspapers and of the organization.

Mr. Meador and Mr. McMahon conferred; and Mr. McMahon, as near as his recollection recalled, stated that he saw no reason why these records should not be made available inasmuch as the points of information supplied him were matters of public record. (R. 58)

A subpoena was issued out of the United States District Court for the Northern District of Texas, Fort Worth Division, to be served upon Harte-Hanks Newspapers, a corporation, demanding Harte-Hanks Newspapers to appear in the United States District Court, at the United States courthouse in Dallas, Texas, to testify before the grand jury and to bring certain papers. An unsigned, undated subpoena was left with Harte-Hanks Newspapers directing the production of documents described in a paper called an "Annex". (R. 2, 8) The unsigned subpoena called for the production of articles of incorporaton, profit and loss statements, correspondence and various other papers. (R. 9-12) Other subpoenas were issued to Banner Publishing Company, Greenville, Texas; to Marshall Publishing Company, Marshall, Texas, Matt Sheley, Publisher, and to The Greenville Herald-Banner, Greenville, Texas. (R. 12-20) A subpoena was also issued to Denison Herald, Inc., Denison, Texas. (R. 25-28) Apparently there was not any demand for the production of any papers,

records or other information in connection with the subpoena directed to Matt Sheley. (R. 21-22)

The material which the parties and witnesses were directed to produce related to articles of incorporation, by-laws, profit and loss statements, balance sheets, correspondence and other communications between the corporation, its officers, directors or employees and (1) Harte-Hanks, its partners, employees or agents, (2) Banner Publishing Company, its officers, employees or agents, (3) any newspaper in the Harte-Hanks chain, their officers employees or agents and (4) any other concerns and any other persons relating to (a) acquisition of Greenville Morning Herald by purchase, merger or otherwise; (b) competition between Greenville Morning Herald and Greenville Evening Banner; (c) relative strength of the Herald and the Banner and (d) means and methods, if any, to be used by Greenville Evening Banner in driving Greenville Morning Herald out of business. In general, except for the subpoena directed to Matt Sheley, each subpoena that was served called for the production of papers and facts substantionally as set forth in the above sentence of this paragraph. (R. 8-20, 25-28)

The service of subpoenas directed to Harte-Hanks Newspapers, Banner Publishing Company, Marshall Publishing Company, Matt Sheley and Denison Herald, Inc., was not valid service. None of the copies left with the parties purportedly served was a copy of a valid subpoena within the meaning of Rule 17 (d) Federal Rules of Criminal Procedure; in this, that the papers left with the parties as copies were not signed by the clerk or the deputy

clerk, and neither were the officers Returns or the Service Fees blanks completed on the purported subpoenas purportedly served.

Bruce Meador, an employee of Harte-Hanks Newspapers, testified as follows:

> "Mr. McMahon (attorney for Harte-Hanks Newspapers) told Mr. Horton (an agent of the Federal Bureau of Investigation) of a recent article in the Bar Association Journal concerning the inspection of records, and he told him that if this information was to be used in connection with criminal prosecution, he would not give him any information. He said that 'We wish to cooperate with you (the agent); but I want to place you on notice that if it is to be used in connection with criminal prosecution, we do not intend to give you any information' ". (R. 46)

The agent, Mr. Horton, said that he did not know the purpose for which the requested information was to be used. (R. 46) Mr. McMahon stated to the agent that he wanted him "to place a note in your report that we called this to your attention, and we are giving you that information on this condition." (R. 46) When the witness was asked "What was the condition that you speak of?", the witness answered "That it was not to be used in connection with criminal prosecution." (R. 47)

Mr. McMahon was specific in his statement respecting the limitations imposed on any information which might be given to the agent, Mr. Horton; who stated that he was commissioned "to make some ex-

aminations and get some information from the files of the paper." (R. 51) Mr. McMahon asked the purpose of the examination, and Mr. Horton stated "That he did not know; that he is merely a field agent." (R. 51) Mr. McMahon then told Mr. Horton that he "wanted to know whether or not the information that he was seeking was to be used by him in furtherance of any criminal prosecution". (R. 52) Mr. Horton stated that he did not know. (R. 52) Mr. McMahon then stated that he wanted "his examination (any examination made by Mr. Horton relating to the business of Mr. McMahon's client) to be definitely on condition that what he learned or what he copied or the information that he got from our files, the files of my client, were not to be used by him in furtherance of any criminal prosecution". (R. 52) Petitioners' attorney requested that the agent incorporate in the report the substance of their conversation and "the condition that I have attached to your going into these files". (R. 52)

Mr. McMahon further testified that he "undertook to get it (the condition which he had imposed) placed in writing in a sense that the gentleman would incorporate it in his report so that not only the examination that he was then conducting, but all future requests, would be goverened by the condition that he was supposed to put in that report. He told me he would put it in there". (R. 54)

Wherefore, petitioners pray that each and all of the subpoenas issued at the instance of Respondent be suppressed; that all and every paper and document obtained by Respondent from any search made by Respondent or its agents or otherwise obtained

by Respondent be ordered returned to Petitioners; that Petitioners have judgment sustaining their claims; that the order of the district court be affirmed; that all of Petitioners' papers and records in the possession of Respondent be returned to Petitioners; and that Petitioners have such other and further relief, general and special, in law and in equity, as Petitioners may be entitled to under the facts.

Respectfully submitted,

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Certificate of Service

I certify that on June 5, 1958, I served this petition for writ of certiorari by air mail upon the Solicitor General, Department of Justice, Washington 25, D. C. and upon Messrs. Victor R. Hansen, Assistant Attorney General, Daniel M. Friedman, Ernest L. Folk III, Henry M. Stuckey, and Paul A. Owens, Attorneys, Department of Justice, Washington 25, D. C., and upon Mr. Heard L. Floore, United States Attorney, Fort Worth 2, Texas, Attorneys for Respondent.

DAN MOODY
Attorney for Petitioners

APPENDIX A

Opinion of The Court Filed: April 24, 1958

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16927

UNITED STATES OF AMERICA,
Appellant,
versus

HARTE-HANKS NEWSPAPERS,
ABILENE, TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

April 25, 1958.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the validity *vel non* of an order of the court below, entered at the outset of a Grand Jury investigation, denying the Government the right to use before the

Grand Jury information obtained by its agents in their examination of the books of the appellees, Harte-Hanks Newspapers, Banner Publishing Company, Marshall Publishing Company, and Denison Herald, Inc. The court entered the order granting appllees' motions upon its finding that, prior to the issuance of the subpoenas duces tecum which the records were required to be produced before the Grand Jury, appellees had submitted to the Government for examination their books, records and files upon their understanding that they would not be used in connection with any criminal investigation or prosecution.

The trial court heard the testimony of three witnesses, Bruce Meador, a representative of the four corporations, T. J. McMahon, their attorney, and Ural E. Horton, Jr., Special Agent of the Bureau of Investigation, Department of Justice. The testimony was in sharp conflict. Meador and McMahon testified that, when the government agent requested the right to examine the books, records and files of the four newspapers, he was informed that these records would be submitted to him on condition that they be not used in connection with any criminal investigation or prosecution, and he was requested to note this condition in his report to the Government.

Horton testified that no such condition was expressed or discussed, that he advised Meador and McMahon that they had a right to refuse to produce the records if they desired, and advised them further that the records could be used against them by the Government, stating further that he did not know the purpose of the investigation then in progress. He

testified that he had no authority to promise any person that he would be "free from any prosecution" concerning any statements made or records furnished. He introduced a long letter adressed to him by Meador which listed the documents furnished and gave certain requested information. This letter, which accompanied Meador's delivery of the corporate records to Horton, made no mention of the condition testified by Meador and McMahon as having been imposed upon the surrender of the records to the Government. The letter also offered to furnish further information if requested to do so. The court resolved the conflicts between the witnesses in favor of appellees. [1]

We are not able to say that these findings of fact are clearly erroneous and we accept them as the predicate upon which our decision will rest. We recognize, however, as do the appellees, that there was

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[1] "After having heard the testimony however, and using the Chancellor's power to pass upon the credibility of the witnesses who have testified, I am of the opinion and find that the Defendants, who and which were being exposed for the divulgence of testimony which could be used before the Grand Jury in a criminal investigation; that such admonition and pledge was exacted by the attorney for these respective publications, and that that understanding, whether it was agreed to by the Government or not is quite immaterial. was to the effect that such information, as, is and was furnished, should not be used in any criminal investigation or by the Grand Jury for such purpose. . . .

". . . This is a country of great liberty, gentlemen, and we must all stand for it. This information must not be used before the Grand Jury for criminal investigation."

The court found further that the records covered by the subpoenas were to be used in connection with a projected criminal prosecution.

no express agreement between the Government and appellees, and that the "understanding" grew out of the conditional furnishing of the records and was an understanding held by appellees alone, it being "quite immaterial," in the court's mind, whether "it was agreed to by the Government."

The motions set forth the condition upon which the corporate records had been turned over to the Government,[2] and prayed solely that "the subpoenas be supressed and . . . said condition fully respected." The motions did not allege that any of appellees' constitutional rights had been violated, but the court, in its memorandum opinion, held that "constitutional provisions" would be violated if use of the records before the Grand Jury should be permitted.[3] The order of the court did not quash

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[2] "The request was made of one of the attorneys for one or more of the above named parties. Said attorney agreed to submit such letters, papers and records for examination by said representative upon the condition that none of them would be used in any manner in the prosecution of any action against any person or company or corporation named or referred to therein. Said papers were submitted to said representative of the Government upon the terms above stated. . . . The use of any of said papers in any attempted prosecution would be in violation of the conditions; and the Court should suppress the subpoenas and order that the above stated condition should be respected.

[3] "It seems quite unnecessary to cite authorities, because one of the fundamentals of a free government denies the right of the servants of the people to secure evidence, or testimony, in the manner indicated for use against the citizen. It would violate not only constitutional provisions, but the very thought of liberty and freedom itself."

or suppress the subpoenas, but commanded only that the restriction placed upon the use of the records by appellees be respected.'

What we have before us, therefore, is an order entered by the District Court at the beginning of a Grand Jury investigation which prohibited in advance the use before the Grand Jury of the information obtained by the government agent from appellees' records. In our opinion the order was without legal justification. Its language showed clearly that the denial of use of the records and information before the Grand Jury was predicated solely upon its declaration that the restrictions and conditions should be respected and enforced. These restrictions were unilateral only. Appellees knew that Horton was not advised of the purpose of the investigation and that, as a mere field agent, he had no authority to agree to any restrictions. The most appellees contend is that they requested that he advise the Government of the restrictions when he made his report. Appellees

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[4] "It is, therefore, the order and judgment of the Court, *that said restrictions and conditions be respected and enforced,* and that any information obtained by the Government Agents through the examination of said books, records, files and correspondence shall not be used before the Grand Jury in any criminal investigation." [Emphasis added.]

[5] Here is the way appellees deal with this question in their brief: "Appellees' attorney told Mr. Horton . . . that he 'wanted to know whether or not the information that he was seeking was to be used by him in furtherance of any criminal prosecution.' The agent stated that he did not know. Appellees' attorney then stated that he wanted the examination 'to be definitely on condition that what he learned or what he copied or the information that he got from the files, . . . were not to be used by him in fur-

did not follow up their request or withhold the records until they learned whether it would be respected --even if it be assumed that some agent of the Government had the authority to enter into such an agreement. Cf. *United States v. Ford, et al* (Whiskey Cases), 1878, 99 U. S. 594.

Appellees pitch their argument entirely upon the contention, not raised in their motions, that the evidence ought to be withheld from the Grand Jury on the ground that it was illegally obtained in violation of appellees' right under the Fourth and Fifth Amendments to the Constitution.

The Fifth Amendment, of course, does not apply to corporations,[6] and it is perfectly clear that the records were not obtained by any illegal search or seizure in contravention of the Fourth Amendment.[7]

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therance of any criminal prosecution.' The agent said that he did not know whether it . . . 'would be used in that manner or not;' and appellees' attorney then stated that he was sure the agent would file a report, and that he 'would appreciate it very much if you would incorporate in the report the substance of this conversation and the condition that I have attached to your going into these files.'"

[6] Genecov v. Fed. Pet. Bd., 5 Cir., 1944, 146 F. 2d 596, 597, cert. den. 324 U. S. 865; United States v. Bausch & Lomb Co., 321 U. S. 707, 762.

[7] Appellees cite in support of their Fourth Amendment contentions United States v. Wallace et al, 1949 336 U. S. 793; Silverthorn Lumber Co. v. United States, 1920, 251 U. S. 385; Weeks v. United States, 1914, 232 U. S. 383; McDonald v. United States, 1948, 335 U. S. 451; Go-Bart Importing Co. v. United States, 1931, 282 U. S. 344; and Judd v. United States, D. C. Cir., 1951, 190 F. 2d 649. Every one of the cases involved an actual forcible search of the premises of a litigant without warrant, and no case cited bears any resemblance on its facts or announces any principle which would support the action of the court below.

Horton entered the premises of appellees with the consent of Meador after having 'phoned for an engagement. Even under appellees' evidence, he made no threats or misrpresentations, employed no strategems, practiced no concealment, coercion or fraud. He did not sieze any records at all. They were delivered to him voluntarily by Meador two weeks after the request was made. Appellees and their attorney knew all the while that they had no assurance from the Government that any condition which might have been imposed would be honored. We find nothing in appellees' argument or in their authorities to justify the ruling of the court below.

It is established law that suppression of evidence prior to an indictment should be considered only when there is a clear and definite showing that constitutional rights have been violated. Cf. *United States v. Wallace*, *supra*, 336 U. S. 793, 796. And under our holding in *Eastus v. Bradshaw*, 1938, 94 F. 2d 788, the validity of his entire proceeding is subject to serious doubt. In *White v. United States*, 1952, 194 F. 2d 215, 217, cert. den. 343 U. S. 930, we held that one proceeding, as are appellees here, under Rule 41(e) Federal Rules of Criminal Procedure, could not hold the Internal Revenue Bureau, as a matter of contract, to its declared policy of granting immunity to persons making voluntary disclosure.

The office of the Grand Jury under our system is an important one, and its ability to function should not be limited by questions of propriety, *Blair et al v. United States*, 1919, 250 U. S. 273, 282, it being vital that it possess the power to conduct broad in-

vestigations[8] fettered only by the requirement that constitutional rights be not infringed.[9]

The order of the District Court granting the motions is reversed and the cause is remanded for the entry of an order denying them.

REVERSED AND REMANDED.

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[8] The Supreme Court in Costello v. United States, 1956, 350 U. S. 356, 362, indicated that the inquisitorial powers of the Grand Jury as was true of its English progenitor, should be so broad as to be free "from control by the Crown or judges."

[9] By the provisions of 15 U.S.C.A. §32 and §33 immunity is granted to any natural person testifying or producing records before a grand jury investigating possible violations of the anti-trust laws.

APPENDIX B

JUDGMENT

Extract from the Minutes of April 24, 1958

UNITED STATES OF AMERICA,

No. 16927

versus

HARTE-HANKS NEWSPAPERS,
ABILENE, TEXAS, ET AL

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said District Court for the entry of an order in accordance with the opinion of this Court.